intertwined" with the merits of the action because it was "difficult to predict whether a finding of liability [would] undermine military discipline" without a more complete factual record. *Id.* at 164. Subsequent Supreme Court cases have rejected a particularized inquiry into the effect a suit will have on discipline in determining claims of intramilitary immunity, applying the doctrine instead whenever a plaintiff's injury "arises out of activity incident to [military] service." *Stanley*, 483 U.S. at 681 (internal quotation marks omitted). *See also United States v. Shearer*, 473 U.S. 52, 59 (1985) (defining intramilitary immunity as applicable whenever the plaintiff's claims are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness"). These same cases have also called into question the argument advanced in *Agent Orange* that an order wrongly denying a claim of intramilitary immunity does "not present a sufficiently grave threat of irreparable harm [such that it] would be effectively unreviewable on appeal from a final judgment." *Agent Orange*, 745 F.2d at 165. *See also Stanley*, 483 U.S. at 682-83.

We conclude that the district court's order denying appellant's claim of intramilitary immunity is immediately appealable under the collateral order doctrine.

B. Justiciability

In *Feres v. United States*, the Supreme Court held that members of the armed services could not sue the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950). In so doing, the Court "creat[ed] a judicial exception to the Federal Tort Claims Act's (FTCA's) broad

waiver of sovereign immunity." *Lutz v. Secretary of Air Force*, 944 F.2d 1477, 1480 (9th Cir. 1991). In the half century since the *Feres* decision, the doctrine of intramilitary immunity has been expanded to bar a variety of claims by servicemen against superior officers. In *United States v. Shearer*, 473 U.S. 52, for example, the Court extended the doctrine to bar the FTCA claim of a soldier who was injured, off-base and off-duty, by another soldier. The doctrine was held to bar two *Bivens* actions in *Chappell v. Wallace*, 462 U.S. 296 (1983) and *United States v. Stanley*, 483 U.S. 669, and several Courts of Appeals, including this court, have held that intramilitary immunity bars suits for damages under 42 U.S.C. § 1983. *See, e.g., Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 51-52 (2d Cir. 1999); *Wright v. Park*, 5 F.3d 586, 591 (1st Cir. 1993); *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 104-08 (3d Cir. 1986); *Brown v. United States*, 739 F.2d 362, 367 (8th Cir. 1984); *Martelon v. Temple*, 747 F.2d 1348, 1350-51 (10th Cir. 1984). National Guardsmen have been similarly barred, under the *Feres* doctrine, from suing superior officers for damages. *See, e.g., Jones*, 166 F.3d at 50-51.

The hesitation to entertain intramilitary lawsuits is most often justified with reference to the "peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline." *United States v. Brown*, 348 U.S. 110, 112 (1954). The Supreme Court has repeatedly counseled that "civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment."

Chappell, 462 U.S. at 300. Moreover, the Constitution's "explicit grant of plenary authority to Congress" to regulate the military counsels against court interference with military decisionmaking. *Id.* at 301. As the Supreme Court wrote in *Orloff v. Willoughby*, 345 U.S. 83 (1953),

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Id. at 93-94.

The scope of the intramilitary immunity doctrine is not precisely defined. While it is clear that military personnel may not sue superior officers for damages, it is also clear that the military's freedom from suits brought by servicemembers is not absolute. As the *Chappell* Court noted, "military personnel are [not] barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 462 U.S. at 304. Indeed, the *Chappell* opinion pointed to a number of cases in which the Supreme Court entertained constitutional and statutory challenges to military regulations. *See Brown v. Glines*, 444 U.S. 348 (1980) (challenge to Air Force rules requiring servicemembers to obtain approval from their commanders before circulating petitions on Air Force bases)); *Parker v. Levy*, 417 U.S. 733 (1974) (challenge to the articles of

Uniform Code of Military Justice); *Frontiero v. Richardson*, 411 U.S. 677, (1973) (challenge to statutes establishing differential benefits for male and female spouses of military personnel).

The line between justiciable and nonjusticiable intramilitary suits has never been precisely defined by the Supreme Court. In *United States v. Stanley*, the Court noted that the cases cited in *Chappell* as examples of justiciable intramilitary suits were all ones in which the plaintiff was seeking "redress designed to halt or prevent . . . constitutional violation[s] rather than the award of money damages." *Stanley*, 483 U.S. at 683. Dibble urges this court to read *Stanley* as meaning that all intramilitary claims for equitable relief, as opposed to money damages (at least where constitutional violations are alleged), are justiciable. Defendant argues that although some equitable suits are allowed in appropriate circumstances, *any* suit in which a "civilian court [is asked] to second-guess military decisions"—particularly personnel decisions—is barred, lest it "impair essential military discipline." *Shearer*, 473 U.S. at 57.

The parties' arguments highlight a disagreement among our sister circuits regarding the justiciability of claims by members of the National Guard and the active military who seek equitable relief for alleged constitutional violations in personnel decisions. The Fifth, Seventh, Eighth, Ninth, and D.C. Circuits have characterized the governing rule as allowing equitable challenges to personnel decisions only when they constitute facial challenges to the constitutionality of military regulations, and not in cases of discrete individualized actions. *See Knutson v. Wisc. Air Nat'l Guard*, 995 F.2d 765 (7th Cir. 1993); *Watson v. Ark. Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989); *Kreis v. Sec'y*

of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989); *Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437 (9th Cir. 1988); *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034 (5th Cir. 1986). The First, Third, and Tenth Circuits, in contrast, have entertained equitable actions protesting military personnel decisions that were not facial challenges to the constitutionality of a military regulation. *See Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99 (3d Cir. 1986); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988). These disparate outcomes reflect a split in the lower courts' understanding of *Stanley* and *Chappell*.

The First Circuit decision in *Wiggington* and the Third Circuit decision in *Jorden* directly embrace the position advanced by Dibble in this case: that the Supreme Court's observations in *Chappell* and *Stanley* regarding the justiciability of certain intramilitary claims "leave[] open claims for injunctive relief against the military." *Jorden*, 799 F.2d at 109. As the Third Circuit wrote in *Jorden*,

> *Chappell* stated that it was not closing the door on claims against the military for constitutional violations, and cited as examples of viable actions three cases—*Brown, Frontiero*, and *Parker*—that involved . . . facial constitutional challenges to regulations or statutes concerning the military. However, the Court in *Brown* expressly stated that judicial scrutiny was not limited to facial constitutional challenges; rather, legitimate constitutional claims could arise from the application of these statutes and regulations.

Id.

The *Jorden* decision justifies this position further by reference to the underlying rationale of *Feres* and *Chappell*:

> One of the concerns underlying *Chappell* is the need for military officers' uninhibited decisionmaking, and the threat to such decisionmaking if officers fear personal liability. The threat of personal liability for damages poses a unique deterrent to vigorous decisionmaking. *See generally*, P. Schuck, Suing Government (1983). On the other hand, the possibility that an officer may be compelled by a court to cease applying a particular regulation in an arbitrary manner, or to reinstate an improperly discharged soldier, poses much less of a threat to vigorous decisionmaking.

Id. at 110.

Other courts of appeals have read *Stanley* and *Chappell* differently. For example, the Fifth Circuit, in *Crawford*, proposed a distinction between constitutional challenges to military regulations (which the court held to be justiciable) and challenges to military personnel decisions (which the court held were nonjusticiable). Responding to the suggestion that all intramilitary suits for injunctive relief are justiciable under *Chappell* and *Stanley*, the court noted that

> the common characteristic of [the Supreme Court decisions allowing constitutional claims against the military] is that they involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters. The nature of the lawsuits, rather than the relief sought, rendered them justiciable. The injunctive-relief exception to

> *Chappell* advocated by appellants could swallow *Chappell*'s rule of deference.

Crawford, 794 F.2d at 1036. The Seventh and Eighth Circuits have adopted this logic as well, both holding that challenges by servicemembers to military personnel decisions are ordinarily nonjusticiable, unless they involve facial challenges to the constitutionality of statutes or military regulations. *See Knutson*, 995 F.2d at 771; *Watson*, 886 F.2d at 1008-10. As the Eighth Circuit explained,

> [T]he Court has entertained, on numerous occasions, suits involving facial constitutional challenges to military regulations or statutes. . . .
>
> There is a vast difference between judicial review of the constitutionality of a regulation or statute of general applicability and judicial review of a discrete military personnel decision. In the first instance, a legal analysis is required; one which courts are uniquely qualified to perform. The second involves a fact-specific inquiry into an area affecting military order and discipline and implicating all the concerns on which *Feres* and *Chappell* are premised.

Watson, 886 F.2d at 1010 (internal citations omitted).

We find this reasoning more persuasive. First, we do not believe that *Chappell* and *Stanley* unambiguously indicate that *all* injunctive claims by servicemembers against their superiors are justiciable. Rather, we agree with the Fifth Circuit that "the nature of the [intramilitary] lawsuits [found justiciable by the Supreme Court], rather than the relief sought, rendered them justiciable." *Crawford*, 794 F.2d at 1036. Second, given the ambiguity

that *Stanley* and *Chappell* present, we do not agree with the Third Circuit's policy judgment that injunctive suits as a class necessarily involve a negligible risk of improper interference with military decisionmaking and discipline. While it may be true, in certain circumstances, that the prospect of an injunction would present less of a "threat to vigorous decisionmaking," *Jorden*, 799 F.2d at 110, than would the prospect of monetary damages, we do not believe that the threat is necessarily negligible. We have previously noted that "the risk of improper judicial interference with military functioning is not abated 'merely because the remedy sought is an injunction rather than damages.'" *Jones*, 166 F.3d at 52 (quoting *Watson*, 886 F.2d at 1009). Moreover, even if officers faced with the prospect of judicial interference would nonetheless feel free to make command decisions, the availability of injunctive relief from a civilian court would undoubtedly affect military discipline. Suits by enlisted soldiers bypassing the hierarchy of the armed services seeking injunctions to overturn personnel decisions of their superiors in civilian courts could substantially alter and interfere with the "peculiar and special relationship of the soldier to his superiors." *Brown*, 348 U.S. at 112.

Our holding does not mean that *all* military personnel decisions are nonjusticiable under the doctrine of intramilitary immunity. As we have noted previously, "the rule of non-justiciability of discretionary military decisions is not absolute." *Jones*, 166 F.3d at 52. For example, "where the military has failed to follow its own mandatory regulations in a manner substantially prejudicing a service member," we will entertain a suit seeking redress of the prejudice. *Id.* (citing *Blassingame v. Sec'y of the Navy*, 866 F.2d 556, 559-60 (2d Cir. 1989); *Ornato v. Hoffman*, 546 F.2d 10, 13 (2d Cir. 1976); *Crawford v. Cushman*, 531 F.2d

1114, 1120 (2d Cir. 1976)). We decline to adopt a categorical rule on the justiciability of intramilitary suits.

Dibble does not allege that the Guard failed to follow its own procedures when it discharged him from service. Indeed, Dibble has availed himself of the full range of federal intramilitary remedies by pursuing his claim for reinstatement and correction of records not only in this forum, but with the Air Force Board for the Correction of Military Records. For the district court to find that the Guard violated Dibble's constitutional rights by discharging him, it would be forced to make a particularized inquiry into the mindset of his superior officers, determining whether their various disciplinary actions were motivated by proper military concerns or by the unconstitutional desire to stifle Dibble's protected First Amendment activity. Especially considering the availability of intramilitary review in cases such as this, we decline to insert the federal courts into military decisionmaking in such an intrusive manner.

CONCLUSION

The order of the district court denying defendant's motion to dismiss is REVERSED, and the case is REMANDED with instructions to dismiss.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD J. DIBBLE,

Plaintiff,

-against-

97-CV-1256
(LEK/RWS)

Major General JOHN H. FENIMORE, V;
Secretary of the Air Force F. WHITTEN PETERS,

Defendants.

APPEARANCES:

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LAWRENCE E. KAHN
District Judge

MEMORANDUM-DECISION AND ORDER

I. Background

Plaintiff Donald J. Dibble was a federal excepted service technician who was employed under 32 U.S.C. § 709 by the New York Air National Guard ("Air Guard" or "NYANG"). He was also a steward for his union at Stewart Air National Guard Base, the Association of Civilian Technicians, which has a collective bargaining agreement with the Air Guard. Although he was a federal civilian employee, § 709(b) required that he maintain military

membership in the Air Guard as a condition of this employment. At the end of his enlistment period in 1994 the Air Guard denied his request to reenlist. He was honorably discharged 8 October 1994, and at that time was automatically separated from his civilian technician employment.

Plaintiff claims that the Air Guard wrongfully denied his request to reenlist in retaliation for his union activities, and in violation of his statutory and constitutional rights. (Decl. Daniel M. Schember at 2, ¶ 1 (Doc. 40, 19 Oct. 1998).) Plaintiff further asserts that "[t]he stated reason for the reenlistment denial was . . . 'performance in a military capacity.' [Plaintiff] was not accused of 'misconduct or delinquency.'" (Id. at 3, ¶ 2.) Defendants, in contrast, assert that he was denied reenlistment because of incidents of misconduct. (Def.'s Mot. Dismiss, or for Summ. J. at 13-14 (Doc. 37, 19 Oct. 1998).)

II. Procedural Posture

In October 1994, Plaintiff asked the Inspector General of the New York National Guard to investigate his reenlistment denial. In April 1995 the Inspector General upheld the Air Guard's action. In December 1995 Plaintiff asked the Inspector General to reconsider his decision; the Inspector General responded that Plaintiff could apply to the Air Force Board for Correction of Military Records ("AFBCMR," or "Correction Board") for a correction of his military record. Plaintiff did so. The Correction Board denied his application on 28 Oct. 1997. (See Admin. R. (hereinafter "A.R.") at 1-2 (Attach. 1 to Doc. 37).)

Plaintiff filed this action 26 August 1997, pursuant to 5 U.S.C. § 706, 10 U.S.C. § 1552, 32 U.S.C. § 709 and 42

U.S.C. § 1983. The Court has jurisdiction under 28 U.S.C. §§ 1331and 1343(a)(3) and (4). Plaintiff seeks (1) a determination that the 1994 denial of reenlistment, with consequent loss of civilian employment, was unlawful, (2) a determination that the 1997 refusal to reenlist s him in his former unit was unlawful, and (3) equitable relief correcting his employment and military records to show that he was not denied reenlistment in 1994, that he was not separated from his civilian employment, and that he has continued to serve to the present, without interruption, in both his military and civilian employment capacities. (See Decl. Daniel M. Schember at 4, ¶ 6.)

III. Motions

Now before the Court are several dispositive motions. Secretary of the Air Force F. Whitten Peters ("Federal Defendant") has moved to dismiss the complaint, or, in the alternative, for summary judgment. (See Notice of Mot. (Doc. 35, 19 Oct. 1998).) Plaintiff has made a cross motion for partial summary judgment (see Notice of Pl.'s Cross Mot. Partial Summ. J. (Doc. 39, 19 Oct. 1998), requesting that the Court

> find the [Correction] Board's decision [to deny Plaintiff's application] to be arbitrary and capricious and to award the relief that is appropriate at this time—remand to the Board for proper inquiry, reconsideration, and issuance of proper findings and reasons.

(Pl.s Mem. Law Supp'ing Pl.'s Opp'n to Def.'s Mot. Dismiss, or for Summ. J. and Supp'ing Pl's Cross Mot. Partial Summ. J. (hereinafter "Cross Mot. Mem.") at 3 (Doc. 41, 19 Oct. 1998).) New York Air National Guard Major General John H. Fenimore V ("State Defendant")

moves to dismiss the complaint on the grounds that (1) Plaintiff has failed to exhaust the available administrative remedies under New York State Military Law, and (2) "the issue he presents is a nonjusticiable discretionary military matter." (Mem. Law Supp. State Def.'s Mot. Dismiss Compl. (hereinafter "State Def.'s Mem.") at 1 (Doc. 49, 2 Dec. 1998).) The State Defendant also joins the arguments of the Federal Defendant in his motion to dismiss.

A. Standards of Decision

1. Dismissal

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In assessing the sufficiency of a pleading, "all factual allegations in the complaint must be taken as true," LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991), and all reasonable inferences must be construed in favor of the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1099 (2d Cir. 1988), cert. denied sub nom., Soifer v. Bankers Trust Co., 490 U.S. 1007 (1989).

> [C]onsideration is limited to the factual allegations in [the] complaint, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.

Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993).

The Rules do not require the plaintiff to set out in detail the facts upon which the claim is based, but only that a defendant be given "fair notice of what the claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Individual allegations, however, that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains are meaningless as a practical matter and, as a matter of law, insufficient to state a claim. Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987).

2. Summary Judgment

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Lang v. Retirement Living Pub. Co., 949 F.2d 576, 580 (2d Cir. 1991). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir. 1990). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Project Release v. Prevost, 722 F.2d 960, 968 (2d Cir. 1983). A genuine issue is an issue that, if resolved in favor of the non-moving party, would permit a jury to return a verdict for that party. R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 57 (2d Cir. 1997) (citing Anderson, 477 U.S. at 248).

When the moving party has met the burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586. At that point, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56; Liberty Lobby Inc., 477 U.S. at 250; Matsushita Elec. Indus. Co., 475 U.S. at 587. To withstand a summary judgment motion, evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. Liberty Lobby, Inc., 477 U.S. at 248-49; Matsushita Elec. Indus. Co., 475 U.S. at 587. Thus, summary judgment is proper where there is "little or no evidence . . . in support of the non-moving party's case." Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

The Court addresses the motions on the basis of these standards.

IV. Discussion

A. Federal Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment

Federal Defendant argues that the Court should dismiss the complaint because it lacks jurisdiction over Plaintiff's eligibility to reenlist and the disposition of his application for reenlistment, which Defendant asserts are nonjusticiable military matters. (Def.'s Mot. Dismiss, or Summ. J. at 2.) In so arguing, however, Defendant misapprehends the gravamen of the complaint, which focuses not on the initial denial of reenlistment, but on the reasonableness of the Correction Board's review of that action. Notwithstanding Defendant's arguments, decisions of the Correction Board

"are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." Chappell v. Wallace, 462 U.S. 296, 303 (1983).

The Court has, in addition, reservations about the categorical scope of Federal Defendant's argument that discretionary decisions by military officials are not subject to judicial review despite Constitutional or statutory guarantees of rights (Def.'s Mot. Dismiss, or Summ. J. at 4-7 & n.4). The logical conclusion of applying that argument to all conceivable cases would be that a military official could engage in unlawful discrimination or retaliation against a protected person, and need only make sure that the adverse action falls in a category characterized as "discretionary" or "internal" to avoid any risk of the unlawful act—no matter how egregious—being reviewed in court. Indeed, by definition an act of discrimination must, at some stage, stem from a discretionary act. The meaning of "discrimination" is, at its most elemental, inextricably linked with choice. There is by definition no choice in a nondiscretionary act. Therefore, by itself, a nondiscretionary act could never give rise to a claim of discrimination.[1] The Court will not conclude that Congress would have provided that protected persons should have certain rights, but left those persons without recourse under law for adjudicating violations of their rights.

For the foregoing reasons, the Court must DENY Federal Defendant's motion to dismiss the complaint.

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[1] The Court recognizes, of course, that discretionary acts with discriminatory purpose—for example, the passage of discriminatory legislation—can give rise to nominally nondiscretionary acts that in fact carry out the discriminatory purpose.

With respect to Federal Defendant's summary judgment argument, the fundamental question is whether there is a genuine issue of material fact that would support a conclusion that, pursuant to the provisions of the Administrative Procedure Act, the Correction Board's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A). The decision of an administrative agency is "arbitrary and capricious" if that body "relied on factors [that] Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

In at least one respect, there is an issue of material fact that bears on whether the Correction Board offers an explanation for its decision that runs counter to the evidence before it. The Correction Board relied on the Air Force advisory opinion in denying Plaintiff's application. (See A.R. at 2.) The advisory opinion, submitted by Lt. Col. Nilda E. Urrutia, U.S.A.F., concluded that a series of "minor infractions" from 1990 to 1994 "form[ed] a legally sufficient basis for discharging SSgt Dibble for unsuitability for further military service." (Id. at 488-89.) In its next paragraph, however, the advisory opinion notes that on 14 December 1995 the Air Guard corrected Plaintiff's Report of Separation and Record of Service to read that he is "eligible" to reenlist in the Air Guard. (See id. at 489-90.) Defendant has offered no explanation of how someone who is "unsuitab[le] for further military service" could at the same time be "eligible to reenlist in the NY ANG." Nor is any cogent rationale readily apparent to the Court. Because the Correction Board's explanation of its decision

runs counter to this evidence—indeed, it appears wholly irreconcilable with it—the Court must DENY Federal Defendant's motion for summary judgment.

B. State Defendant's Motion to Dismiss

State Defendant argues that Plaintiff's complaint must be dismissed because he has failed to exhaust his administrative remedies. (See State Def.'s Mem. at 9-11.) The general rule under §1983, that a plaintiff is not required to exhaust administrative remedies, does not apply to a suit arising from the failure of a military service to follow its own regulations, where "[t]he exhaustion requirement is contained in the very regulations that plaintiff seeks to have enforced." Jones v. New York State Div. of Mil. and Naval Aff., 166 F.3d 45, 54-55 (2d Cir. 1998). The Court has, however, found no exhaustion requirement in any regulation Plaintiff seeks to have enforced; State Defendant has pointed out none. State Defendant's "exhaustion of administrative remedies" argument is thus unavailing.

State Defendant further asserts that Plaintiff's complaint must be dismissed because he seeks relief on a military personnel issue that is non-justiciable. For substantially the same reasons detailed above in the discussion of Federal Defendant's motion to dismiss, the Court finds that Plaintiff's claims are justiciable. Accordingly, the Court must DENY State Defendant's motion to dismiss.

C. Plaintiff's Cross Motion for Partial Summary Judgment

1. Northern District Motion Practice

Local Rule 7.1(a)3 (formerly 7.1(f)) requires that the party opposing a motion for summary judgment shall file a response to the moving party's Statement of Material Facts. That response

> shall mirror the movant's Statement . . . by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises . . . . Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.

In his cross motion for partial summary judgment, Plaintiff submitted a Rule 7.1(a)3 statement under the title Pl.'s Statement of Material, Genuinely-Disputed Facts and Material Facts as to Which There is No Genuine Issue (hereinafter "Pl.'s 7.1(a)3 Statement"), attached to Cross Mot. Mem. (Doc. 41). Plaintiff's statement in part responded, as required under the Local Rule, to Federal Defendant's 7.1(a)3 Statement of Material Facts Not at Issue (Doc. 36, 19 Oct. 1998). (See Pl.'s 7.1(a)3 Statement at 3-5.) Then, in accordance with L.R. 7.1(a)3, as part of his cross motion for summary judgment, Plaintiff further set forth a statement of material facts as to which he contends there is no genuine issue. (Id. at 5-8.)

In response to the cross motion's 7.1(a)3 statement, neither Federal Defendant nor State Defendant submitted a 7.1(a)3 statement. The Defendants thus failed to comply

with L.R. 7.1(a)3's requirement that each submit a response that "mirror[s] the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs." Because Defendants have not met this obligation to controvert with specificity the facts set forth in Plaintiff's statement, the Court in accordance with L.R. 7.1(a)3 will deem admitted as uncontroverted all the facts set forth in Pl.'s 7.1(a)3 Statement at 5-8.

Among these admitted uncontroverted facts are that Plaintiff's submissions to the Correction Board "presented evidence and argument supporting his claims that" (1) his Air Guard superiors were hostile toward him because of his union activities, (2) these superiors punished Plaintiff, but not other Air Guard members, for minor transgressions, (3) these superiors sought to suspend Plaintiff for purported misconduct that was far less serious than misconduct by other Air Guard members that they ignored, (4) these superiors wanted to retaliate against Plaintiff because he defeated their attempt to suspend him, (5) these superiors denied Plaintiff reenlistment in the Air Guard, and thus terminated his employment, for pretextual reasons that would apply to many Air Guard members who were not denied reenlistment—pretextual reasons that were "far less significant than misconduct by others" who were not barred from reenlistment—and (6) these superiors denied Plaintiff reenlistment in retaliation for his exercise of statutory and Constitutional rights related to his union, workplace, and Air Guard activities. (See id. at 5-6.)

Also admitted as uncontroverted is that Plaintiff demonstrated that he had requested, but not received, records from the Air Guard relating to performance evaluations, decisions to grant or deny reenlistment, and

union activities, of other members of his Air Guard unit; that the Correction Board neither requested nor obtained such records, nor did it address the Air Guard's failure to provide those records to Plaintiff; that he requested that the Correction Board obtain information relating to the relief from command of "the officer principally responsible for denying" Plaintiff's reenlistment, but that the Correction Board did not obtain this information; that the Correction Board based its decision to deny Plaintiff's application "solely on the 'facts and opinions stated in the advisory opinion'," but that neither the advisory opinion nor the decision explained the apparently unreconcilable conclusions that while a series of minor infractions made the Plaintiff "unsuitable for further military service," he was nonetheless eligible to reenlist in the Air Guard; and that the advisory opinion and decision failed to address any of the evidence supporting, or make any findings regarding, Plaintiff's contentions as detailed in the points numbered (1) through (5) in the paragraph immediately above this one. (See id. at 6-8.)

2. Application of Facts and Standards to Cross Motion

A court that reviews an agency decision must be deferential to the agency's expertise and ultimate substantive decision, but it also must require "that the agency exercise its discretion in a reasoned manner." Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1512 (D.C. Cir. 1989). An agency fails to exercise its discretion in a reasoned manner if, pursuant to the provisions of the Administrative Procedure Act, its decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A). An agency decision is "arbitrary and capricious" if the agency

"relied on factors [that] Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. As with other agencies, decisions of the Correction Board "are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." Chappell, 462 U.S. at 303.

As detailed above, the uncontroverted facts show that the Correction Board had before it specific allegations that Air Guard authorities directed bias, animus and inequitable treatment against the Plaintiff. The uncontroverted fact that the Air Guard deems Plaintiff eligible to reenlist renders highly suspect the conclusion that a series of admittedly minor infractions made Plaintiff "unsuitable" for military service. In view of this, it was not reasonable for the Correction Board to "entirely fail[] to consider an important aspect of the problem." 463 U.S. at 43. The uncontroverted facts are that the Correction Board did not make certain records available to the Plaintiff or obtain that information for its own review. That information could be relevant to Plaintiff's allegations that his superiors' bias or desire to retaliate against him led them to deny his reenlistment on pretextual grounds. That, in turn, could explain the inconsistency of a person deemed eligible for reenlistment being found at the same time to be "unsuitable" for further military service. Accordingly, the Correction Board's failure to consider an important aspect of the matter before it is substantively linked to "an explanation for its decision that runs counter to the evidence before [it]." Id.

Because there is no genuine issue of material fact adverse to Plaintiff's contention that the Correction Board's

decision was arbitrary and capricious, Plaintiff is entitled as a matter of law to partial summary judgment on his cross motion, and the Court GRANTS his motion for partial summary judgment. Pursuant to 5 U.S.C. § 706, the Court remands the case to the Correction Board for proper inquiry, consideration, findings, and reasons. The Correction Board will obtain, and make available to Plaintiff, any evidence relevant to assertions that Plaintiff's Air Guard superiors were hostile toward him because of his union activities or that they desired to retaliate against him because he defeated their attempt to suspend him. The Correction Board will also obtain and make available to Plaintiff records of members of his Air Guard unit who have in a relevant time period been granted or denied reenlistment, with respect to (1) their "performance in a military capacity," (2) the bases for the decisions to grant or deny them reenlistment, and (3) in each case whether the Air Guard member was also employed as a technician and had ever served as a union official.

Specifically excluded from this order is information or documents pertaining to the relieving of command of Major John J. Birmingham, to any misconduct or unsatisfactory duty performance by him, or to any investigation of alleged misconduct or unsatisfactory duty performance by him. Plaintiff requested production of these documents earlier in these proceedings. Defendants submitted the documents in question for in camera review by the Honorable Ralph W. Smith, Jr., United States Magistrate Judge. After careful examination of the documents, Magistrate Judge Smith concluded "that there is nothing contained therein [that] would be in any way relevant or calculated to lead to the discovery of admissible evidence. . . ." (Order at 3 (Doc. 56, 7 Dec. 1998).) Whether to obtain

those documents for review is accordingly left to the discretion of the Correction Board.

The Court directs the Correction Board to address these issues:

> (1) Whether Plaintiff's Air Guard superiors were hostile toward him because of his past union activities;
>
> (2) Whether Plaintiff's Air Guard superiors punished Plaintiff, but not other Air Guard members, for minor transgressions;
>
> (3) Whether Plaintiff's Air Guard superiors sought to suspend Plaintiff for purported misconduct that was far less serious than misconduct by other Air Guard members that they ignored;
>
> (4) Whether Plaintiff's Air Guard superiors desired to retaliate against Plaintiff because he defeated their attempt to suspend him; and
>
> (5) Whether Plaintiff's Air Guard superiors denied Plaintiff reenlistment in the Air Guard, and thus terminated his employment, for pretextual reasons that would apply to many Air Guard members who were not denied reenlistment—pretextual reasons that were "far less significant than misconduct by others" who were not barred from reenlistment.

The Court further directs the Correction Board to make specific and numbered findings of fact, and conclusions of law based on such factual findings, on each of Plaintiff's claims as detailed herein. The Correction Board shall take care to enunciate a reason for its decision that the Court can measure against the "arbitrary and capricious" standard of

the A.P.A., see Kreis, 866 F.2d at 1514-15, and to offer an explanation for its decision that does not run counter to the evidence before it, Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43—most notably, to the evidence that the Air Guard has found Plaintiff eligible for reenlistment.

CONCLUSION

For the reasons stated above, it is hereby:
ORDERED that Federal Defendant's motion to dismiss the complaint, or, in the alternative, for summary judgment against Plaintiff, is **DENIED;** and

IT IS FURTHER ORDERED that State Defendant's motion to dismiss the complaint is **DENIED;** and

IT IS FURTHER ORDERED that Plaintiff's cross motion for partial summary judgment is **GRANTED;** and

IT IS FURTHER ORDERED that this case is **REMANDED to the Correction Board** for proper inquiry, reconsideration, and issuance of proper findings and reasons, in accordance with the directions specified herein; and

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this order by regular mail upon the parties to this action.

IT IS SO ORDERED.

DATED: 19 January 2000
Albany, New York

/s/
HONORABLE LAWRENCE E. KAHN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD J. DIBBLE,

Plaintiff,

-against-

97-CV-1256
(LEK/RWS)

Major General JOHN H. FENIMORE, V;
Secretary of the Air Force F. WHITTEN PETERS,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFF:
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Washington D.C. 20009-1064

DANIEL M. SCHEMBER, Esq.

FOR THE DEFENDANTS:
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James T. Foley U.S. Courthouse
445 Broadway Ste 231
Albany NY 12207-2976

JAMES C. WOODS, Esq.
Assistant U.S. Attorney

LAWRENCE E. KAHN
District Judge

MEMORANDUM-DECISION AND ORDER

Plaintiff Donald J. Dibble claims in this action that his former employer, the New York Air National Guard ("Air Guard"), wrongfully denied his request to reenlist in 1994, and thereby compelled the termination of his employment as a service technician with the Air Guard, in retaliation for his activities as a union steward for the Association of Civilian Technicians, and in violation of his statutory and constitutional rights. (Decl. Daniel M. Schember at 2, ¶ 1 (Doc. 40, 19 Oct. 1998).) Although he was a federal civilian employee, 32 U.S.C. § 709(b) required that he maintain military membership in the Air Guard as a condition of this employment.

On 19 January 2000 this Court denied Secretary of the Air Force F. Whitten Peters's ("Federal Defendant") motion to dismiss the complaint, or, in the alternative, for summary judgment against Plaintiff; denied Major General John H. Fenimore, V's (State Defendant) motion to dismiss the complaint; granted Plaintiff's cross motion for partial summary judgment; and remanded the case to the Air Force Board for Correction of Military Records ("Correction Board") for proper inquiry, reconsideration, and issuance of proper findings and reasons, in accordance with the directions specified in the Court's decision. (See Memorandum-Decision and Order at 15 (Doc. 59).)

Now before the Court is State Defendant's motion for reconsideration of the Court's denial of his motion to dismiss the complaint. (See Notice Mot. Recons. (Doc. 60, 31 Jan. 2000); Bruce J. Boivin Decl. at 3 ¶ 16 (Doc. 61, 31 Jan. 2000).)

I. Standard of Review for Motions for Reconsideration

Motions for reconsideration proceed in the Northern District of New York under Local Rule 7.1(g), unless otherwise governed by Federal Rule of Civil Procedure 60. The "clearly erroneous" standard of review applies to motions for reconsideration. The moving party must "point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995) (Calabresi, J.). Generally, the prevailing rule in the Northern District "recognizes only three possible grounds upon which motions for reconsideration may be granted; they are (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or

(3) the need to correct a clear error of law or prevent manifest injustice." In re C-TC 9th Ave. Partnership, 182 B.R. 1, 3 (N.D.N.Y. 1995) (McAvoy, C.J.).

In the present case, State Defendant does not contend that the first ground, an intervening change in controlling law, applies. Nor does he contend that the second ground, the availability of new evidence not previously available, applies. Defendant is instead arguing on the basis of the third ground, that his motion for reconsideration should be granted in order to correct a clear error of law or prevent a manifest injustice.

This is a demanding standard.

> It is not enough . . . that [the moving party] could now make a more persuasive argument . . . . "[M]ere doubt on our part is not enough to open [up] the point for full reconsideration." The law of the case will be disregarded only when the court has "a clear conviction of error" with respect to a point of law on which its previous decision was predicated.

Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981) (Friendly, J.) (citations omitted) (quoting White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940), and Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir. 1964) (Friendly, J.)). A simple difference of opinion, no matter how deep it runs, will not warrant reconsideration. "[A]ny litigant considering bringing a motion for reconsideration must evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant." In re C-TC 9th Ave. Partnership, 182 B.R. at 3.

II. Discussion

A review of this Court's 19 January 2000 Memorandum-Decision and Order, the Boivin Declaration, the State Defendant's memorandum of law supporting the motion for reconsideration (Doc. 62, 31 Jan. 2000), and the Plaintiff's memorandum of law in opposition to the motion for reconsideration (Doc. 67, 18 Feb. 2000), reveals a great deal of dispute, but no clear error. Notably, even if the Court were to accept Defendant's arguments regarding the applicability of a requirement to exhaust State administrative remedies, the record indicates that Plaintiff was indeed pursuing State administrative appeals when the State's Acting Inspector General for the Air Force National Guard diverted his appeals to the federal government's Correction Board. (See letter from. McInerney to Schember of 12/18/95.) Defendant cannot demonstrate that the Court's earlier decision was clearly erroneous with respect to the issue of Plaintiff's exhaustion of State administrative remedies, when a colorable interpretation of the record before the Court is that by adhering to this direction from the State, Plaintiff complied with any requirement to exhaust State administrative appeals. Moreover, it would appear manifestly unjust if the State, having shepherded Plaintiff away from further pursuit of administrative remedies in the State arena, were now to benefit by contending that Plaintiff—by doing as the State asked him to do—had failed to fulfill prerequisites to the pursuit of remedies in federal court.

As cited in State Defendant's memorandum, the Second Circuit has identified one important aspect of a requirement that National Guard members exhaust State administrative appeals to be that the failure to do so deprives the Governor of an opportunity to review the matter, and perhaps

"obviate any need for judicial interference in military affairs." Jones v. New York State Div. of Mil. and Naval Affairs, 166 F.3d 45, 54 (2d Cir. 1998). When the State itself has directed Plaintiff's appeals away from a route that would lead to review by the Governor, then the rationale that the Second Circuit identified for avoiding judicial involvement dissolves.

With respect to justiciability, State Defendant invokes this Court's earlier analysis of the applicability of the test developed in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). See Jones v. New York State Div. of Mil. and Naval Affairs, No. 93- CV-862, 1997 WL 266765 (N.D.N.Y. 7 May 1997) (Kahn, J.). In that case, however, this Court did not conclude that Jones's claims were nonjusticiable per se, but that Jones's failure to exhaust State administrative remedies rendered them nonjusticiable. See id. at *10. That holding is sharply at variance with Defendant's adamant position that Plaintiff's claims are in a realm of nonjusticiable discretionary military decisions. As indicated supra, it is not clear that Plaintiff Dibble did fail to exhaust his State administrative appeals. Defendant's arguments no more reveal clear error with respect to the question of justiciability than they do with respect to the question of the exhaustion of State administrative remedies.

CONCLUSION

For the reasons stated above, it is hereby:

ORDERED that State Defendant's motion for reconsideration of the Court's 19 January 2000 denial of his motion to dismiss the complaint is **DENIED**; and

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this order by regular mail upon the parties to this action.

IT IS SO ORDERED.

DATED: 5 July 2000
Albany, New York

/s/
HONORABLE LAWRENCE E. KAHN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATED COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES
COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24 day of Nov. two thousand three.

Donald J. Dibble,

Plaintiff-Appellee,

v Dkt No: 00-6243

John H. Fenimore,

Defendant-Appellant

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Donald J. Dibble.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: /s/
Arthur M. Heller
Motions Staff Attorney